

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Student Hearing Office
810 First Street, NE, Second Floor
Washington, DC 20002

OSSE
Student Hearing Office
May 06, 2013

RITA HARRIS, on behalf of
ISIAIAH HARRIS

Petitioner,

v

DISTRICT OF COLUMBIA PUBLIC SCHOOLS

Respondent.

Case No.: 2013-0006

Hearing Officer: Kimm Massey, Esq.

Room No.: 2003

HEARING OFFICER DETERMINATION

**BACKGROUND AND
PROCEDURAL HISTORY**

Student is now an eighteen year old male, and he is incarcerated. On January 4, 2013, Petitioner filed a Complaint against DCPS and the Office of State Superintendent (“OSSE”), alleging that DCPS and/or OSSE failed to implement Student’s IEP. As relief for this alleged denial of FAPE, Petitioner requested that the local educational agency (“LEA”) be ordered to immediately begin fully implementing Student’s IEP, award compensatory education, transfer any and all school records from a specified private school to and furnish Petitioner with service logs for SY 2012/13.

On January 16, 2013, OSSE filed a Motion to Dismiss, arguing that the Complaint failed to state a claim for relief against OSSE as a matter of law because OSSE is the state educational agency (“SEA”), not the first-line direct provider of educational services, which is the responsibility of the LEA and DYRS for committed youth. OSSE also asserted failure to join an indispensable party, DYRS.

On January 17, 2013, DCPS filed its Response to the Complaint. Therein, DCPS asserted that it is no longer the responsible LEA because Student is in custody, which means that OSSE is responsible for implementation of the IEP.

On January 23, 2013, Petitioner filed a Response to OSSE’s Motion to Dismiss, asserting that OSSE is ultimately responsible for the implementation of Student’s IEP.

On January 31, 2013, DCPS filed a Motion for Summary Judgment As A Matter of Law based upon its assertion that OSSE is responsible for implementation of the IEP since Student is in DYRS custody.

On January 31, 2013, DCPS filed, and then withdrew, a Motion for Continuance.

On February 4, 2013, the hearing officer issued an Order denying OSSE's Motion to Dismiss, in light of OSSE's ultimate responsibility, as the SEA, for ensuring Student's receipt of a free appropriate public education ("FAPE").

On February 6, 2013, the hearing officer convened a prehearing conference and it was determined that Student is incarcerated in a District of Columbia facility, he is receiving services from a school program for committed youth ("School Program"), and DCPS is the LEA for the program.

On February 6, 2013, OSSE renewed its Motion to Dismiss, and by Order dated February 12, 2013, the hearing officer granted OSSE's Motion to Dismiss.

On February 19, 2013, Petitioner filed an Amended Complaint that identifies the School Program as Student's service provider; and on February 20, 2013, Petitioner filed a Motion to Amend the Complaint. On February 20, 2013, the hearing officer issued an Order Granting the Motion to amend the complaint.

The parties concluded the Resolution Meeting process by participating in a resolution session on April 9, 2013. No agreement was reached, but the parties agreed not to shorten the 30-day resolution period. Therefore, the 45-day timeline began on March 22, 2013 and will end on May 5, 2013, which is the HOD deadline.

On April 9, 2013, the hearing officer convened another prehearing conference for this matter and issued a Prehearing Order.

On April 9, 2013, DCPS filed a Motion to Compel, seeking to compel Student's attendance at the hearing. On April 11, 2013, Petitioner filed its Response opposing the motion. On April 12, 2013, the hearing officer issued an Order denying the motion to compel.

By letter dated April 9, 2013, DCPS disclosed twenty-five documents (Respondent's Exhibits 1-25). Also on April 9, 2013, Petitioner disclosed twenty-seven documents (Petitioner's Exhibits 1-27).

The hearing officer convened the due process hearing on April 17, 2013.¹ Petitioner's Exhibits 1-8 and 11-28 were admitted without objection, and Petitioner's Exhibits 9-10 were admitted over DCPS's objection. Respondent's Exhibits 1-14, 16, and 18-25 were admitted without objection, and Respondent's Exhibits 15 and 17 were admitted over Petitioner's objection.

¹ Counsel for each party and the witnesses for each party are listed in the Appendix that accompanies this decision.

Thereafter the hearing officer received Petitioner's opening statement, but DCPS waived its opening statement. After Petitioner presented its testimonial evidence, DCPS rested on the record, and the hearing officer received closing statements prior to concluding the hearing.

The due process hearing was convened and this Hearing Officer Determination is written pursuant to the Individuals with Disabilities Education Improvement Act ("IDEA"), 20 U.S.C. §§ 1400 et seq., the implementing regulations for IDEIA, 34 C.F.R. Part 300, and Title V, Chapter 30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

ISSUE(S)

The issue to be determined is as follows:

1. Did DCPS fail to fully implement Student's IEP subsequent to Student's December 2012 incarceration?

FINDINGS OF FACT²

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact are as follows:

1. Student is currently eighteen years old. He is in the custody of _____ and he is receiving educational services from the School Program.³
2. Student's current IEP is dated November 30, 2012. The IEP identifies Student's primary disability as multiple disabilities, and it requires Student to receive 27 hours per week of specialized instruction, 120 minutes per week of behavioral support services, and 60 minutes per week of speech/language pathology services, with all specialized instruction and related services to be delivered outside general education.⁴
3. For the past three years, Student attended a private school. However, on December 17, 2012, Student was placed in a juvenile detention center in the District of Columbia.⁵
4. In February 2013, the School Program held a parent-teacher conference that Parent attended. Parent was shown a folder that contained 2 assignments for Student, and the special education coordinator told Parent that she had just received Student's IEP

² To the extent that the hearing officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, then the hearing officer has taken such action based on the hearing officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

³ See Complaint at 2; testimony of Parent.

⁴ Respondent's Exhibit 14.

⁵ Testimony of Parent.

the day before the conference. Parent was also advised that the School Program had no records of Student's grades at the private school.⁶

5. Parent spoke with Student about the services he is receiving at the School Program, and Student kept saying that he was doing tests. Student never said whether he was or was not in a resource room, but Student did tell Parent that he was not receiving any therapy.⁷
6. Student did not receive behavioral support services on 1/23/13 and 2/14/13, and 2/27/13, but Student received 60 minutes of behavioral support services on 1/30/13, 90 minutes of behavioral support services during the week of 2/20/2013, and during the month of March 2013 Student received 60 minutes of behavioral support services each week.⁸
7. Student did not receive speech/language pathology services on 1/24/13, 2/14/13 and 2/28/13, but he received but he received 60 minutes of speech/language pathology services on 1/31/13, 2/7/13, 2/28/13, and during the month of March 2013 Student received 60 minutes of speech/language pathology services each week.⁹
8. Student has exhibited some behavior problems while at the School Program. Hence, he threw a chair after getting angry while interacting with a female and weapons were found in his during a search.¹⁰
9. Petitioner's special education advocate has no direct knowledge of whether, and/or to what extent, Student has been receiving services at the School Program. Instead, the advocate attempted to testify at the due process hearing about what Student told Parent about his school services, but this testimony from the advocate did not match up with Parent's testimony about what Student has said to Parent about his services.
10. The special education advocate's testimony was not persuasive in this case because the advocate also attempted to prove lack of implementation of Student's IEP by pointing to Progress Reports and service trackers that covered specified periods of time as proof that services were not provided outside of those periods, offering the fact that she has not seen any documents demonstrating that Student is in a self-contained environment as proof that Student is not in a self-contained environment at the School Program, and testifying that notations on a Progress Report indicating that certain IEP goals had not been introduced "shows an extremely minimal amount" of services are being provided.
11. Ultimately, the advocate was unable to state with certainty whether, and/or to what extent, Student has received instruction from a special educator at the School

⁶ Testimony of Parent.

⁷ Testimony of Parent.

⁸ Respondent's Exhibit 24.

⁹ Respondent's Exhibit 24.

¹⁰ Testimony of Parent.

Program. Hence, the advocate testified that Student “may have received some” instruction from a special educator at the School Program “but not all 27 hours.”¹¹

12. Petitioner has requested as compensatory education 36 hours of individual tutoring, 12 sessions of community-based counseling with each session to last for 2-3 hours, and 6 one-hour sessions of speech/language pathology services. The plan indicates that it is intended to cover the alleged denial of FAPE that occurred because Student did not begin receiving implementation of his IEP until “approximately near mid-February.” However, the advocate who prepared the plan testified that it is intended to cover the period from 12/17/12 through 4/11/13.¹²
13. Petitioner’s proposed compensatory education plan is not reasonably calculated to provide the educational benefits that likely would have accrued to Student from special education services DCPS should have supplied in the first place.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer’s own legal research, the Conclusions of Law of this Hearing Officer are as follows:

“[T]o prevail on a claim under the IDEA, a party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP.” *Catalan v. District of Columbia*, 478 F. Supp. 2d 73 (D.D.C. 2007) (citing *Houston Independent School District v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000)).

The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). In this regard, IDEA does not require a departure from the ordinary default rule that plaintiffs bear the risk of failing to prove their claims. *See id.*; *Ridley School District v. M.R.*, 680 F.3d 260, 269 (3rd Cir. 2012); *L.E. v. Ramsey Board of Educ.*, 435 F.3d 384, 391 (3rd Cir. 2006).

In the instant case, Petitioner asserts that the School Program, and therefore DCPS, failed to implement Student’s IEP. However, a review of the evidence in this case reveals that Petitioner has failed to establish what amount of specialized instruction Student has received and is receiving at the School Program. Moreover, although the documentary evidence reveals that Student missed three sessions of speech-pathology services in late-January to February, the same documentary evidence demonstrates that Student otherwise received his speech/language services in February and March, and there is no evidence at all going to the issue of whether Student received speech/language services during any other time period at issue. Under these circumstances, insofar as specialized instruction and speech/language pathology services are

¹¹ See testimony of advocate.

¹² Petitioner’s Exhibit 28; testimony of advocate.

concerned, Petitioner has not met its burden of proving that DCPS failed to implement substantial or significant provisions of the IEP.

On the other hand, the evidence in this case reveals that when Student initially began attending the School Program, he was not receiving any behavioral support services at all. Then, once Student began receiving his behavioral support services at the School Program, he was essentially provided with only half of the 120 minutes of services he was entitled to receive each week. The evidence further demonstrates that during this time period, Student experienced several significant behavior problems at the School Program. Under these circumstances, the hearing officer concludes that Petitioner has met its burden of proving that DCPS denied Student a FAPE by failing to significant provisions of his IEP with respect to behavioral support services, and Student suffered educational harm as a result. As compensation for this denial of FAPE, the hearing officer will award Petitioner six sessions of community based counseling for Student, with each session to last 1.5 hours. *See Reid v. District of Columbia*, 401 F.3d 516, 522-524 (D.C. 2005) (hearing officer may award prospective educational services to compensate for past deficient program but award must tailored to provide educational benefits that likely would have accrued from special education services that should have supplied in first place).

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ordered:

1. DCPS shall provide Petitioner with funding for six 1.5-hour sessions of community based counseling for Student.
2. All remaining claims and requests for relief in Petitioner's January 4, 2013 Complaint are **DENIED and DISMISSED WITH PREJUDICE.**

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 U.S.C. § 1415(i).

Date: 5/5/2013

/s/ Kimm Massey
Kimm Massey, Esq.
Hearing Officer